

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DANIEL SWAFFORD II

Claimant

VS.

O'REILLY AUTOMOTIVE, INC.

Respondent

AND

**AMERICAN CASUALTY COMPANY
OF READING, PA**

Insurance Carrier

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Docket No. 1,006,045

ORDER

Claimant appeals the July 14, 2004 Award of Special Administrative Law Judge Marvin Appling. Claimant was awarded benefits for a 5 percent impairment to the body as a whole based upon the Special Administrative Law Judge's determination that neither Edward J. Prostic, M.D.'s nor Paul S. Stein, M.D.'s medical opinions outweighed that of the other. This case was placed on the summary docket for decision without oral argument and deemed submitted effective October 22, 2004.

APPEARANCES

Claimant appeared by his attorney, William L. Phalen of Pittsburg, Kansas. Respondent and its insurance carrier appeared by their attorney, Garry W. Lassman of Pittsburg, Kansas.

RECORD AND STIPULATIONS

The Board Appeals (Board) has considered the record and adopts the stipulations contained in the Award of the Special Administrative Law Judge.

ISSUES

What is the nature and extent of claimant's injury?

For clarification, it is noted claimant alleged an injury on June 21, 2002. That is the date utilized in the form K-WC E-1 Application for Hearing and the date specified at the regular hearing. However, claimant, in his submission letter to Administrative Law Judge Jon L. Frobish, utilized a June 12, 2002 date, which was then inappropriately utilized by the Special Administrative Law Judge in the Award. The Board finds that the actual date of accident in this case is June 21, 2002, as stipulated at the regular hearing.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the Special Administrative Law Judge (Special ALJ) should be affirmed.

Claimant suffered accidental injury on June 21, 2002, while lifting a brake rotor. Claimant experienced a pop in his back, suffering immediate pain. Claimant had been working as assistant manager for respondent for approximately six years, and handling brake rotors was one of his regular job duties. Claimant advised respondent of the injury and continued performing his regular job until June 26, 2002. However, on that day, claimant appeared at the Labette County Medical Center emergency room, where he was examined by Dr. Perot and sent home to rest. Claimant did not improve. He then went to Dr. Rose, who is the back-up for his normal family practitioner, Dr. Bullard. Dr. Rose provided claimant with antibiotics and also advised him to rest. Claimant then went to Dr. Kolette Smith, the Katy Clinic, and finally to the Labette County Medical Center, where he was admitted into the intensive care unit, suffering from a 104 degree fever. Claimant underwent an MRI of the back and various other tests, whereupon he was diagnosed as having aseptic meningitis, congestive heart failure, acute renal insufficiency, dehydration and cardiac arrest. Claimant remained in the hospital for eight days, being discharged on July 9, 2002. Dr. Thomas A. Moore, an infectious disease specialist, examined claimant, diagnosing Q-fever.

Claimant, after recovering from the aseptic meningitis, continued having back difficulties. He was referred to Edward J. Prostic, M.D., board certified orthopedic surgeon, at the request of his attorney. Dr. Prostic examined claimant on one occasion, on March 31, 2003. After reviewing the MRI report, he diagnosed claimant with mild diffuse bulging at L4-5 and L5-S1. Dr. Prostic acknowledged he read the report only, not having the opportunity to review the actual films. He assessed claimant a 10 percent impairment to the body as a whole for the injuries to his low back based upon the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). Dr. Prostic acknowledged, on cross-examination, that he used the range of motion model and not the DRE model, as is normally recommended by the AMA *Guides*. He provided claimant no restrictions. He found claimant's range of motion to be normal except for a 50 percent restriction in claimant's lateral bending. There was no atrophy, weakness or muscle reflex limitations noted during the examination.

Claimant was then referred by respondent's attorney to Paul S. Stein, M.D., a board certified neurosurgeon, for a one-time examination occurring on June 20, 2003. Dr. Stein examined claimant after reviewing x-rays, which he read as normal, and the MRI films, which he also stated were essentially normal. He acknowledged that there was very, very minimal bulging at L4-5 and L5-S1, but stated that in his opinion, the actual MRI report was a normal finding.

Dr. Stein's physical examination elicited normal findings, with the exception of mild tenderness on the right side of claimant's low back. Dr. Stein diagnosed claimant with a back strain only, testifying there was no evidence of any structural injury as a result of the June 21, 2002 accident. He noted that claimant had a prior history of injury while lifting in December of 2001 and also testified that aseptic meningitis can cause back pain. However, Dr. Stein was not able to say within a reasonable degree of medical probability if that was the case in this instance.

Dr. Stein assessed claimant a zero percent impairment under the *AMA Guides* (4th ed.), finding that claimant fell within category DRE I, having only muscle tenderness, without intermittent muscle guarding. He testified claimant's minimal disc bulges were not clinically significant. Claimant was provided no restrictions by Dr. Stein.

In workers compensation litigation, it is the claimant's burden to prove his entitlement to benefits by a preponderance of the credible evidence.¹ In this instance, the Board finds that the Award of the Special ALJ granting claimant a 5 percent impairment to the body as a whole should be affirmed. Neither Dr. Prostic's nor Dr. Stein's opinions are sufficiently persuasive to eliminate the other's opinion from consideration. Both Dr. Stein and Dr. Prostic, utilizing the *AMA Guides* (4th ed.), provided impairment ratings for claimant and justified those ratings based upon their examinations of claimant and their review of the various medical tests claimant underwent. The Board, therefore, finds that utilizing the opinions of both Dr. Prostic and Dr. Stein, claimant has a 5 percent impairment to the body as a whole from the injuries suffered on June 21, 2002.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Special Administrative Law Judge Marvin Applying dated July 14, 2004, should be, and is hereby, affirmed.

¹ K.S.A. 44-501 and K.S.A. 2001 Supp. 44-508(g).

IT IS SO ORDERED.

Dated this ____ day of November 2004.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
Garry W. Lassman, Attorney for Respondent and its Insurance Carrier
Marvin Appling, Special Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director